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CIVIL AND POLITICAL RIGHTS, INCLUDING THE QUESTION OF INDEPENDENCE OF THE JUDICIARY, ADMINISTRATION OF JUSTICE, IMPUNITY

Written statement submitted by the Asian Legal Resource Centre,
a non-governmental organization in general consultative status

The Secretary-General has received the following written statement which is circulated in accordance with Economic and Social Council resolution 1996/31

[29 December 1999]

Right to a fair trial in Asia

1. The International Covenant on Civil and Political Rights (ICCPR) guarantees fair trial. The provisions on due process contained in this convention are an integral part in the safeguarding of fair trial. However, in several countries in Asia there are considerable threats to the right to a fair trial.

2. In Cambodia, the limitations on fair trial arise from several factors. Cambodia as yet does not have a comprehensive penal code or criminal procedure code. What is used as the penal code is a document produced during the period of the United Nations Transitional Authority for Cambodia (UNTAC), entitled "Guidelines for a criminal procedure in Cambodia". This short document of about 44 pages was designed to be a guideline for drafting a comprehensive criminal law and procedure. This document mentions about 40 criminal offences. Owing to the limited number of offences many acts which constitute crimes in most countries are not considered as crimes. For several years there had been many attempts to complete a penal code and a criminal procedure code, also with the assistance of several international agencies. However, no legal document has yet been passed by the legislature. This absence of a penal code and a criminal procedure code remains a great impediment to guaranteeing the right to fair trail in Cambodia. Besides this, the majority of the poorly paid judges (with a monthly official salary of about US$ 20) are not qualified legal professionals. As a result, without comprehensive legal and judicial reform, the right to fair trial cannot be guaranteed in Cambodia. Though the Constitution of Cambodia recognizes the presumption of innocence of the accused, in actual practice a person is presumed guilty by the time the person is produced in court. The guilt or innocence is determined during the pre-trial stage, which takes place before prosecutors. The prosecutor's inquiries are private and are not open to the public. This procedure is very much open to suspicion. The international community can contribute a great deal towards reform by way of technical assistance, to which the Government of Cambodia has remained open.

3. There have been considerable obstacles to fair trial in Sri Lanka. Sri Lanka has very comprehensive legislative provisions to guarantee a fair trial. However, these provisions are often suspended under the emergency regulations and special laws such as the Prevention of Terrorism Act. During the operation of such laws what are usually considered offences under the normal law cease to be offences. For example, when the special legal provisions prohibit police officers below the rank of assistant superintendent from authorizing the disposal of dead bodies the result is the suspension of the provisions of the criminal procedure relating to investigations into crimes. As a result, even grave crimes such as murder are left univestigated. As criminal investigation is the first step to ensuring a fair trial, when no criminal investigation is conducted many crimes are simply not brought before a court. The number of cases which are left uninvestigated is on the increase. In the case of disappearances, the number of cases which have not been investigated according to the provisions of the Criminal Procedure Code of Sri Lanka is over 30,000. As a result of the failure to investigate serious crimes such as murder, a general attitude has developed in the police of selectively investigating crimes. This has led to the loss of faith in the judicial system among the people, and discourages people from reporting crimes. This was illustrated in a well-known case called the Hokandara murder case where all the members of a family involved in a land dispute were killed one by one as they returned home over a period of about eight hours. No neighbour went to complain to the police during all that

time. This incident shook the nation, demonstrating the extremely low level of faith in the criminal justice system among the people. The police have often complained that they are unable to act independently as the politicians constantly interfere. In the criminal justice system in Sri Lanka serious crimes are prosecuted on the basis of files of criminal investigations submitted to the Attorney General's Department by the police. When a crime is not investigated, no criminal file is submitted and therefore no case is filed before court. The present impasse in criminal investigations can be overcome if an independent prosecutor's office is created and vested with the responsibility of supervising criminal investigations. The present legal arrangement for the Attorney General to act as the prosecutor is inadequate as the Attorney General is officially the legal adviser to the Government and is publicly perceived as directly under the influence of the Government in power. Thus, if fair trial is to be ensured for all victims of crimes a drastic change in the system of prosecution in Sri Lanka is unavoidable.

4. Recently, some cases involving prominent political personalities in Malaysia have caught the attention of the world. The procedures in these cases raise questions relating to fair trial. The threats to lawyers acting on behalf of the accused, the restrictions placed on the accused to call for evidence to counteract the evidence placed by the prosecution, the special restrictions placed on the media in reporting cases and the abuse by police of their powers have raised serious doubts about whether the accused in politically sensitive cases can have a fair trial.

5. Under the military rule in Myanmar, it can be said without exaggeration that there is no right of fair trial for persons who have been placed in the position of the "accused" for political reasons. Those cases are not heard in open court but often in military camps and prisons. The verdicts are predetermined and there is no possibility of proving one's innocence.

6. In Viet Nam and China there have been attempts at legal reform. However, the stress of such reforms is more on commercial law and not on the basic criminal law and criminal procedure. Trial procedures in criminal cases have not seen any considerable change. The trial procedure still remains within the framework of the former socialist legal framework in which the rights of the accused are subordinated to the prerogatives of the State. The execution of judgements within a very short time after the trial does not allow much room for an independent and impartial appeal process.

7. Criminal laws dating back over a century, an equally old but virile and well-developed judicial system and the provisions of the Constitution ensure the essentials of fair trial in India. An independent and strong bench and bar, a free press and effective forums for agitating against abuse/misuse of authority and the denial of rights through writ jurisdiction of the courts and public interest litigation (PIL) have made fair trial part and parcel of the liberal democratic institutions for good governance in India. Even the rigours of ad hoc special laws have been toned down by public opinion and intervention of the judiciary. Recently, the Supreme Court laid down a procedure for the police when arrests are made, including an effective charter of rights for accused persons and suspects. However, years of neglect and the low priority of modernization and reform have rendered certain areas of the criminal justice system dysfunctional, adversely affecting the quality of the service delivered. Arbitrary arrests as preventive actions by police, delay in producing suspects before the courts within the statutory minimum time frame, refusal of bail, delay at the stages of investigation and trial, with "under-trials" languishing in custody for long periods, the lower judiciary steadily becoming

suspect, the deteriorating standards of the legal profession, the very unsatisfactory conditions of jails, prison and halfway houses and, more importantly, the failure to reform the police and the prison subsystems are the weak links in the generally strong and vibrant criminal justice system of India. Political appointment of public prosecutors and government pleaders, the Director of Prosecution, Advocate General, etc., as in a "spoils system", has introduced an element of bias in the functioning of these officials. The arrangement for legal assistance to indigent accused in trials has yet to develop into an effective institution. The poor and illiterate accused generally receive low-quality defence. An element of gender disadvantage is noticed in respect of women in the application of criminal laws. This is evident from the massive response to the Women Commissions instituted by certain states for attending to crimes against women, domestic violence, and crimes related to dowry/inheritance. The criminal laws need revision and rewriting, along with the police and prison laws. Police and prison reforms have to be introduced and implemented in earnest to make fair trial institutions deliver without discrimination in India.

8. The Constitution of the Kingdom of Nepal, 1990, has envisaged the standard of criminal justice as guaranteed by the international instruments. The practice, however, suffers from serious weaknesses. Certain fundamental rights, like the right to legal assistance by a legal counsel of choice, the right to be protected against arbitrary arrest and detention, etc. are under continuous attack by investigating and prosecuting agencies. In brief, a study on the criminal justice system carried out by the Center for Legal Research and Resource Development has pointed out the following weaknesses that thwart fair trial in Nepal, the practice of arbitrary arrest and detention is phenomenal; the warrant or notice of arrest and detention is not given to the suspect in an overwhelming number of cases; confession has been effectively used to convict the accused, and as such torture is commonly used to extract confessions, obviously violating the right to remain silent; the suspect is never given information concerning the charge and ground of arrest; grant or rejection of bail is not guided by facts and evidence but by the personal discretion of the trial judge; security bonds in the form of cash or assets for bail are often required, hence poor people are incarcerated simply for their inability to procure bond, making justice accessible only to wealthy people; the trial courts, absent the right of the accused to a defence by a legal counsel or himself/herself, grant extensions of police custody for prolonged periods pending investigation; continuous trial is not ensured, and thus people have to wait a long time for the final hearing.

9. Given the problems that exist in terms of fair trial in the countries mentioned above, as well as in several other countries, the Asia Legal Resource Center (ALRC) urgently recommends the appointment of a special rapporteur to investigate and report on the persistent obstacles to fair trial in Asia, their causes and consequences. He or she should, in consultation with practising professional lawyers, advocates and judges, as well as national and regional human rights advocates and organizations in the region who have direct experience in dealing with these problems in the respective countries, make recommendations as to how to eliminate these obstacles.